

***United States Court of Appeals
for the Second Circuit***

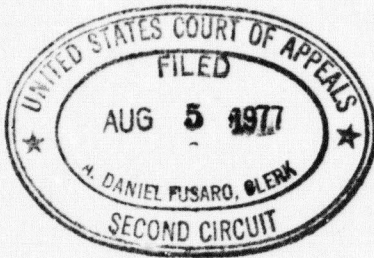


**APPELLANT'S
REPLY BRIEF**

77-7174

77-7174

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAILROAD, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

REPLY BRIEF OF APPELLANTS

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TABLE OF ABBREVIATIONS

- | | | |
|-----------|---|---|
| 75 Tr. | - | Refers to transcript of Harris' 1975 preliminary injunction hearing |
| Tr. | - | Refers to transcript of Harris' 1976 preliminary injunction hearing |
| P. Ex. | - | Refers to exhibits introduced by plaintiff during Harris' 1976 preliminary injunction hearing |
| P. 75 Ex. | - | Refers to exhibits introduced by plaintiff during Harris' 1975 preliminary injunction hearing |
| D. Ex. | - | Refers to exhibits introduced by defendant during Harris' 1976 preliminary injunction hearing |
| D. 75 Ex. | - | Refers to exhibits introduced by defendant during Harris' 1975 preliminary injunction hearing |
| Op. | - | Refers to Judge Gagliardi's Opinion filed March 25, 1977 |
| Pl. Br. | - | Refers to plaintiffs' main brief filed with this Court |
| D. Br. | - | Refers to defendant's answering brief filed with this Court |

PRELIMINARY STATEMENT

Defendant pretends in its answering brief that the issues before this Court are factual and consequently has filled its brief and various addenda with a stream of factual details prefaced by an exposition of the "clearly erroneous" standard, hoping thus to obscure the substantive issues that have triggered this appeal.

One distressing aspect of this approach is that factual claims made by defendant have no basis in the record. For example, the Railroad attempts to rebut a detailed history of past discrimination against Harris by claiming that it was making some unspecified "changes in the procedures" for qualifying ASMs at the time Harris applied for the job (D. Br. p. 3). Neither the existence of these alleged "changes in the procedures", or what they were, or to whom they applied was ever before mentioned by the defendant and is not part of the record below. This statement and numerous other purported "facts" raised for the first time on appeal are not part of the record and must be disregarded.* See List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965);

* See, in particular, the Railroad's attempt to supply an explanation as to why it found Harris' first report "inadequate" and why a second report was so "urgently" needed, as well as its attempt to justify the admittedly disparate treatment of Harris by claiming that it was necessary to make an "example" of him, discussed infra, at pp. 9-11 and 18-21.

Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974); Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir.), cert. denied, 409 U.S. 1038 (1972).

Defendant's preoccupation with factual details is at the expense of addressing the significant questions of law presented in our main brief with respect to which the "clearly erroneous" standard does not even apply. Likewise, the ultimate issue for resolution - whether or not there was discrimination - is not subject to the "clearly erroneous" standard and, contrary to the major thrust of defendant's brief, an appellate court is not bound by the trial court's findings on this issue. Kinsey v. First Regional Securities, No. 1338-71 (D.C. Cir. April 18, 1977); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975); Moore's Federal Practice, ¶52.05 (Supp. to Vol. 5 at 79). To the contrary, it is for this Court, while giving deference to subsidiary findings that are themselves not clearly erroneous, to "make an independent examination of whether defendant's conduct constitutes a violation of Title VII." Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976).

Our reply brief, then, will refocus upon the basic legal issues before the Court and, without attempting to correct every factual distortion in defendant's answering brief, will address those findings of subsidiary fact which are clearly erroneous.

I

THE DISTRICT COURT'S CONCLUSION THAT
THE RAILROAD ARTICULATED VALID NON-
DISCRIMINATORY REASONS FOR REMOVING
HARRIS WAS WITHOUT BASIS IN LAW OR FACT

- A. The Train Delays: The Railroad Never Claimed At Trial That Alleged Responsibility For The Train Delays Was A Reason For Removing Harris; It Was Wholly Improper For The District Court To Base Its Decision On A Ground Not Articulated By The Railroad

Defendant in its answering brief (D. Br. p. 20) does not contest our legal assertion that McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972) places the burden on the employer to articulate legitimate, non-discriminatory reasons for removing plaintiff, and that the Court may not attempt to justify plaintiff's dismissal on grounds not articulated by the Railroad (Pl. Br. pp. 57-59). Instead, defendant maintains that it did claim at trial that Harris' alleged responsibility for the train delays was an articulated reason for his dismissal and, in support of this contention, misstates the cross-examination testimony of its principal witness, Gaynor.

The Railroad must concede, in the first instance, that Gaynor's direct testimony on this issue is unambiguous. Having listened (as the Railroad's representative at counsel table) to extensive testimony on the cause of the delays, Gaynor testified - not that the train delays were the reason for Harris' removal - but that it was Harris' "attitude"

and "insubordination" that lead to his dismissal (Tr. 492, 493). Plaintiffs' counsel, aware that Gaynor's direct testimony was a radical shift from statements he had made at his pre-trial deposition, undertook to impeach Gaynor's credibility by repeating verbatim his earlier statement and asking him if he recalled the same:

"Q. Mr. Gaynor, you told me at your deposition that the reasons you took Mr. Harris out of service that night were, one, train delays and Mr. Harris' refusal to admit his responsibility for those delays; two, Mr. Harris' failure to show up with a written report on the evening of November 11; and, three his past record.

"A. Yes. Right." (Tr. 535.) [Emphasis supplied]

Gaynor's admission of this prior inconsistent statement was elicited by plaintiffs on the record in order to establish the shifting grounds for dismissal asserted by the Railroad. The Railroad, which made no attempt to rehabilitate Gaynor on redirect, cannot salvage its position now by reference to testimony which served only to impeach Gaynor's credibility. The futility of such an effort is underscored by the direct testimony - not mentioned by the Railroad - of Assistant Superintendent Dixon, Gaynor's superior, who took the stand after Gaynor and stated that he had not even decided who was responsible for the delays when he approved Harris' removal for alleged insubordination (Tr. 661).

The attempt of Railroad's counsel to retrieve this point on appeal must fail. A Court of Appeals may not accept defendant counsel's (or the District Court's) "post hoc rationalizations" for discharging a plaintiff in a Title VII case. Baezer v. New York City Transit Authority, No. 76-7295, 77-7092 (2d Cir. June 22, 1977), citing FPC v. Texaco, Inc., 417 U.S. 380 (1974) and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962). Cf. SEC v. Chenery, 332 U.S. 194, 196 (1946). As this Court pointed out in Baezer, only the reasons for dismissal articulated by the employer are to be examined:

"In the case of such illegal discharges, the wrong done by the employer consists not of discharging the employee but of discharging him for an illegal reason. It is irrelevant to the consideration of a remedy for that wrong that the wrong might have been avoided by a discharge for a legal reason. Cf. NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971). (If discharge of employee occurred even partially for motive that violated labor laws, he has suffered a remediable wrong, even if ample valid grounds existed for his discharge)."

Plaintiffs do not concede for a moment that Harris was responsible for the train delays and could have been removed on that ground.* But even if Harris were responsible, that would be irrelevant to the issues on appeal. A reviewing court must determine whether the defendant has met its burden under McDonnell Douglas v. Green solely on the basis of the grounds articulated by defendant.

* See discussion in our Main Brief, pp. 21-23 as well as Addendum A, infra, at A1-A3.

B. Insubordination: The Railroad's
Argument That Insubordination In The
Present Case Can Be Established With-
out Proof Of A Refusal By Harris To
Obey An Order Lacks Merit

We showed in our opening brief that the relevant and largely undisputed facts concerning the preparation of a second report can not, as a matter of law, constitute insubordination. This position is based on a line of authority establishing that insubordination in a situation such as this can only be shown by proof of an intentional, direct refusal by Harris to obey a superior's order (Pl. Br. pp. 59-63).

The Railroad takes issue with this argument, and relies for its authority, not on any case law, but rather on a dictionary definition of "insubordination." Plaintiffs submit that the reasoned opinions of several circuit, district and state courts are entitled to far greater legal weight with this Court, Mr. Webster's well-deserved reputation as a philologist notwithstanding.*

The Railroad also claims that Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir. 1974), originally cited by plaintiffs, confirms its position that insubordination need not be established by a direct refusal to obey an order. To make its point, the Railroad under-

* Had defendant chosen another dictionary it would have come up with a different definition. See Ballantine Law Dictionary (3rd ed. 1970) at 641 which defines insubordination as a "refusal to obey directions."

scores a somewhat vague reference in the opinion to Mrs. Jack's "insubordinate, aggressive conduct" on the day of her discharge. Defendant would have done well to underscore the immediately preceding phrase in the opinion which establishes that Mrs. Jack was fired for her "repeated refusals to do her work as instructed", 498 F.2d at 124. Moreover, defendant fails to refer to earlier passages in the opinion which clearly indicate that Mrs. Jack's "insubordinate, aggressive conduct" on the day of her dismissal consisted of a direct refusal to follow instructions (insubordination), coupled with a "heated discussion" in which Mrs. Jack admittedly used obscene language (aggressive conduct), 498 F.2d at 123.

The Railroad's tortuous reading of Jack is necessitated by the fact that it concedes, as it must, that Harris had already written one report (Tr. 487, 513, 648), never refused to follow any order to write a second report (Bloomfield Dep. 79), began to write a second report during the night of November 10 (Tr. 439), advised management that he had not completed the report on November 10 (Tr. 73, 129, 579, 589), was never advised and had no reason to believe that Gaynor would want to see the report on the night of November 11 (Tr. 75, 76, 499), and offered to write the report on the night of November 11 after he had explained to Gaynor the nature of his emergency dental work (Bloomfield Dep. 79). This is hardly the repeated refusal to follow

a direct order which is necessary to provide the basis for a finding of insubordination as in Jack.*

Defendant misses the point when it argues (D. Br. pp. 17-18) that Harris' testimony as to busy periods during the night of November 10-11 or his dental problem on November 11 were "sham" excuses since Harris could have completed the report anyway.** Plaintiffs do not argue, as defendant claims, that it would have been impossible to write a second report during the 24-hour period before he was fired. Plaintiffs' claim - and all that plaintiffs need establish in the present case - is that his not completing the report within 24 hours was hardly an insubordinate refusal to follow an order. This position is amply established by the case law (ignored by defendant) that holds that even negligent conduct is not insubordinate, as well as by the essential facts concerning Harris' response to the request for a second report (which defendant does not contest). (See Pl. Br. 59-63).

* The Railroad's position also requires it to wholly ignore the undisputed fact that every instance in which a white employee has been disciplined for insubordination has involved an intentional refusal to follow a direct order from a superior, and that Harris' demotion is the first departure from this policy. See Pl. Br. pp. 59-60.

** Defendant, as well as the District Court, imply (though never so state) that the fact that Harris went back to bed prior to his return to work on the evening of November 11 was somehow an indication that he was insubordinate. There is no basis for such an inference. The inference is to the contrary and obviously those individuals who work a graveyard shift do not keep the same hours as the rest of the working world.

Though not essential to our argument on the insubordination issue, we contend that the court's subsidiary findings that Harris' first report was "insufficient" and that Harris knew the "urgency" of the investigation and request for a second report (Op. pp. 8, 12) were clearly erroneous.

In discussing the alleged insufficiency of Harris' report, the Railroad has chosen to ignore the undisputed testimony of its own witnesses cited in our Main Brief (pp. 61-63) and now claims that management wanted a second report from Harris so that it would know "why Mr. Harris claimed not to know [when] line 3 was going out of service" when "indications" from other personnel were that Harris had been informed (D. Br. p. 19). The flaw in this attempt to justify the court's findings is that there is not a scintilla of evidence to support this contention (as the complete lack of transcript references would indicate). To the contrary, the record clearly establishes that Dixon claimed Harris' first report was "too short" and wanted one as "long" as the yardmaster's or C Tower's, while Gaynor felt the report was inadequate because it didn't discuss the delays to the two arriving trains (Tr. 647, 648, 530). The Railroad's disregard of the testimony of its key witnesses is certainly understandable: Dixon, on cross-examination, admitted that

Harris' report was in fact as complete as the yardmaster's (Tr. 645); C Tower admitted he never wrote a report for Dixon (Tr. 400); and the yardmaster's report which Harris was supposed to emulate had no reference to the delays to the two arriving trains (for the simple reason that management had told the yardmaster they were not interested in the delays of the two arriving trains), (P. Ex. 5; Tr. 184, 185, 217). This testimony hardly supports the Railroad's contention (or the District Court's conclusory finding) that Harris' report was "insufficient" or "too short".

The Railroad does not even respond to plaintiffs' contention that there is no basis for the court's other subsidiary finding that this was an "urgent" investigation requiring a second Harris report within 24 hours. There can be no response to Dixon's own testimony that he never pressured Gaynor to prepare a report as Gaynor had claimed (Tr. 549, 644). Likewise, there is no factual support for Dixon's claims that Harris was the lone recalcitrant in that the investigation was complete and all the other reports Dixon requested had been written at the time Harris was fired: it cannot be denied that at that time only the yardmaster had actually written a report; that A Tower has not to this day been asked to write a report; and that C Tower was not asked to write one until after Harris was removed (Tr. 267, 400).

Plaintiff does not claim, nor is it his burden to establish, that there was "a conspiracy to get him". (D. Br. p. 19). It is plaintiffs' claim, however, that the Railroad's argument that Harris' first report was "inadequate" for purposes of its "urgent" investigation is simply a rationalization for its third attempt to get rid of Harris, who has been a thorn in its side for a long time.*

C. Poor Performance: The Railroad's Attempts To The Contrary Notwithstanding, There Is Simply No Support In The Record For The Court's Conclusion, Unbutressed By Specific Findings Required By Rule 52(a), That Harris' Alleged Poor Performance Justified His Dismissal In 1976

With respect to the third ground claimed by the trial court to justify the Railroad's dismissal of Harris in 1976, the trial court's only "finding" was its statement that five unidentified instances of Harris' "poor performance" were "not effectively rebutted" (Op. at 4).

Pursuant to Rule 52(a), the trial court must include as many subsidiary facts as necessary to disclose to

* The Railroad's antipathy towards Harris is perhaps understandable on a personal level - nobody likes to be sued. This, of course, does not render the Railroad's actions defensible and it is for this very reason that retaliatory firings constitute a separate ground for relief under 42 U.S.C. §2000e-3(a).

the reviewing court the steps by which it reached its ultimate conclusion on each factual issue (Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43 (7th Cir. 1976); 9 Wright & Miller, Federal Practice and Procedure, §2579, at 710) so that the appellate court is afforded a clear understanding of the basis of the trial court's decision. Lemelson v. Kellogg Company, 440 F.2d 986 (2d Cir. 1971); Barron & Holtzoff, Federal Practice and Procedure, §1121 (Wright Revision 1961). Here, the trial court's sole subsidiary finding on supposed poor performance requires this Court to guess (as does the defendant in its brief) as to the steps by which it concluded that the Railroad articulated a valid reason under McDonnell Douglas v. Green for demoting Harris. To be sure, subsidiary findings need not be discursive; however, they may not be so vague, conclusory and bereft of any of the underlying analysis that they remain insulated from appellate review. Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). In the present case, the district court's failure to even identify the purported instances of poor performance effectively precludes any

attempt to determine whether its finding is at all supported by credible evidence.*

Defendant vainly attempts to justify the lower court's unsupported holding by guessing at which instances the court may have referred to when it mentioned five "unrebutted" instances of poor performance. With respect to the so-called five instances which the Railroad offers as "undoubtedly" the five instances referred to by the court below (D. Br. Addendum B-p. B6), the record simply

* We submit that the trial court's error is compounded by its failure to consider or make any findings as to testimony by defendant's own witnesses as to these salient facts: 1) Harris' direct supervisor, who (unlike Gaynor) worked directly with Harris longer than any other witness, found his performance as an ASM perfectly satisfactory (75 Tr. 305-306); 2) despite Mr. Stewart's supposed complaints in 1971 (D. Br. pp. 23, 27), the Railroad found Harris qualified to be permanently assigned to the ASM position in 1972 (75 Tr. 13); 3) since 1972, Harris has usually been the sole management employee on the job during the 11 p.m. to 7 a.m. shift in charge of station operations. If, as the Railroad contends, Harris is incompetent and does not care whether or not work is properly performed (D. Br. p. 24), query why he was not assigned to a daytime ASM position where he would be under constant supervision and his chief duty would be writing down in a log the departure and arrival times of trains (Tr. 699-700, 704); 4) pay increases for ASMs are based on merit and the supposedly incompetent Harris is one of the highest paid ASMs (75 Tr. 282; Pl. Ex. 15; Dixon Dep. 49). The failure to make any findings as to these uncontroverted subsidiary facts obviously relevant to the issue of alleged poor performance leads to the conclusion that the court's opinion is devoid of "requisite subsidiary facts to undergird the ultimate facts" found by the district court. Causey v. Ford Motor Co., 516 F.2d 416, 421 (5th Cir. 1975).

does not support the proposition that such allegations were not fully rebutted during the course of the 1975 hearing. (Pl. Br. pp. 64-68).

For example, the Railroad claims that "[t]here can be no doubt but that [the failure to cancel PPW 1258, an equipment train, on October 6, 1974 was one of] the five instances from the 1975 record referred to by the Court below...which it said were not effectively rebutted by Mr. Harris" (D. Br. Addendum B p. B6). The record, however, squarely conflicts with this assertion. While Mr. Harris conceded that he allowed train PPW 1258, an equipment train, to leave the station contrary to instructions left for him on a clip board hanging on the office wall, the Railroad conveniently fails to note that this equipment train, bearing not a single passenger, got no further than five minutes out of Pennsylvania Station before Mr. Harris contacted the engineer and had him return to the station; that the error occurred in the dead of night, on a weekend; that the train returned safely; and that no one was inconvenienced by this mishap. (75 Tr. 163-164; D. 75 Ex. E) Moreover, the attempt to magnify such an error into a major transgression providing a basis for justifying Harris' dismissal is conspicuously inconsistent with Mr. Gaynor's testimony during the 1976 hearing. During cross-examination,

Gaynor attempted to explain the disparity in his treatment of Harris in comparison with his treatment of Yardmaster Chauncey who, though guilty of a 21-minute delay to an equipment train, received not so much as a reprimand. In response to an inquiry by the court as to the relative significance of Chauncey's error, Gaynor unwittingly revealed the baseless nature of his reprimand of Harris concerning the PPW 1258 incident:

A.: No, that was just what you call the making a move with extra set of equipment...

The Court: It is not a passenger train?

A.: Just an extra piece of equipment, shop car. It could leave two hours late, we do it, your Honor. I wouldn't even worry about it, no criticism whatsoever." (Tr. 562-63) (emphasis added)*

More importantly, by resorting to this guessing

* Similarly, among the other 1975 exhibits proffered by the Railroad as "undoubtedly" the five instances referred to by the court are several instances in which Harris allegedly failed to make an entry in the Stationmaster's log with respect to something that occurred during his shift. (e.g., D. 75 Ex. D, D. 75 Ex. G). The Railroad's attempt to blow up such minor transgressions into incidents of major proportions is ludicrous, indeed, in that it is uncontested that other ASM's have supposedly failed to "make proper log entries" (Tr. 682, 717), yet Gaynor has never made a written report on these incidents and inserted them in the ASM's personnel file (Pl. 75 Ex. 19). Thus, even if Harris did not make a log book entry on some occasion, this hardly evidences "poor performance" sufficient to justify his removal from service after 23 years on the Railroad.

game with respect to five unidentified instances of poor performance, the Railroad has apparently accepted the implicit holding of the lower court that the six remaining allegations of poor performance were effectively rebutted and the adverse inference arising therefrom as to the Railroad's discriminatory motives in writing such baseless reports. (Pl. Br. pp. 67-8).

II.

THE RAILROAD DOES NOT QUESTION THE FACT THAT
THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD
WITH RESPECT TO THE ISSUE OF WHETHER HARRIS WAS
SUBJECTED TO DISPARATE DISCIPLINE AND HAS FAILED
TO REBUT CONVINCING EVIDENCE WHICH ESTABLISHES
THAT UNDER THE PROPER TEST HARRIS RECEIVED
DISPARATE TREATMENT

In order to make out a case of disparate treatment plaintiffs are required to show that: (1) the Railroad has a subjective disciplinary policy; and (2) that the operation of this policy resulted in some whites receiving less onerous punishment than Harris for similar alleged infractions, or, alternatively, in some whites receiving the same punishment for more serious infractions. See Pl. Br. pp. 49-56.

The Railroad does not contest that this is the proper legal standard to determine the issue of disparate treatment. Instead, defendant attempts to avoid the inevitable conclusion of disparate treatment by distorting and

sometimes ignoring the factual record to which the trial court applied an erroneous legal standard.*

First, in response to Harris' contention that he is the only ASM who has ever been demoted for any reason, the Railroad suggests that this statement is incorrect and that one "John Gallagher" was removed from his job as an ASM in the "mid sixties" (D. Br. 11-12). The only support for this contention offered by the Railroad is an obscure hearsay reference made in a decision of the New York State Division of Human Rights concerning a complaint filed by Mr. Harris (D 75 Ex. R). Indeed, an examination of the record in 1975 and 1976 discloses that there is not one word of testimony with respect to Mr. Gallagher. Exhibit R itself states no more than:

"Insofar as the appointment of Mr. John Gallagher is concerned, it was actually a reappointment after suspension for dubious reasons and made to rectify an error in judgment by respondents."

This document, which is silent as to whom Mr. Gallagher is, what position he held, for what reason he was suspended, and for how long the suspension lasted, simply does not contradict

* The District Court's opinion suggested that the existence of subjective disciplinary procedures weighed in favor of defendant on the issue of disparate treatment and further, that plaintiffs were seemingly required to prove that all whites subjected to these procedures had received more favorable treatment than Harris. Op. p. 14. See Pl. Br. pp. 43-4.

plaintiffs' contention that there is no evidence of any ASM, other than Mr. Harris, who has ever been fired for any reason. It is utterly frivolous that defendant even raises the case of Mr. Gallagher at this point in time as if his "suspension for dubious reasons", which "error in judgment" was later rectified by his reappointment, justifies the Railroad's demotion of Mr. Harris.

The Railroad next argues that our contention that Harris is the only ASM ever removed from service ignores the four ASM's who failed the book of rules examination in September of 1974 and, who supposedly, as a result of Railroad "policy", were removed from their ASM slots (D. Br. p. 12). This argument fails to consider the fact that such employees were removed from service only as a result of a settlement agreement worked out by the court below, not as a result of internal Railroad "policy". Moreover, the speciousness of defendant's claims is evident by the fact that this so-called "policy" was conspicuously not applied to Messrs. Landsperg and Rizzacasa, both of whom failed a written examination administered shortly after Harris returned to service, but neither of whom were removed from service as a so-called "safety risk". Defendant's attempt to justify its double standard (D. Br. p. 6, fn. 7) by referring to the testimony of Rizzacasa, who failed the exam, is hardly persuasive in light of Assistant

Superintendent Dixon's testimony that an employee who failed any of the exams would be removed from service. (See Pl. Br. pp. 13-14.)

The Railroad does not seriously question the argument that the only management employees, other than Harris, who have ever been demoted for insubordination were a group of individuals who, in December of 1972, refused to obey direct orders to cross a picket line to move trains containing perishable goods during a protracted and bitter strike.* Indeed, the Railroad tacitly concedes that the refusal of these employees to cross a picket line is a qualitatively and quantitatively different situation from the record purportedly justifying Harris' removal in 1976 (D. Br. 12).

The most telling admission of the disparate treatment accorded Harris is made by defendant on pages 12-13 of its answering brief. Therein, the Railroad effectively concedes that numerous white employees received far lighter punishment for more or equally serious purported transgressions (Pl. Br. pp. 30-33), by seeking to justify these discrepancies on wholly specious grounds:

* There is nothing in the record to support the Railroad's assertion that Gallagher was removed from management for insubordination (D. Br. 12), and, as to Landsperg, the Railroad's own witness (Dixon) testified Landsperg was removed for unsatisfactory performance and not for insubordination (Tr. 669).

"[w]hile ... the LIRR would ideally like to give the same discipline for the same offenses to all personnel, represented as well as non-represented management employees, the fact remains that the same offense by the latter group often has to be viewed more seriously and disciplined more severely than when committed by the former group because of the very difference in positions held."

Thus the Railroad goes on to claim that, since Harris was a member of management, his demotion was necessary to "set an example" for other employees.

In advancing these "factual" allegations for the first time on appeal, the Railroad once again goes beyond the record. Aside from the obvious impropriety of this attempt (see discussion supra at p. 1), the Railroad's new "facts" are flatly contradicted by its own witness, Mr. Dixon, who testified without qualification that it is immaterial whether an individual is a represented or management employee, rather "the punishment fits the crime" (Tr. 682). Moreover, defendant's entire argument is premised on the fact that Harris actually received unusually harsh discipline even by the Railroad's own standards. Its attempt to justify this disparate treatment by post hoc rationalizations that it was necessary to make an "example" of Harris, which rationalizations have no basis in the record, serves only to highlight the inequitable

treatment Harris has received.*

III

THE RAILROAD HAS FAILED TO ADDRESS
PLAINTIFFS' ARGUMENT THAT THE LOWER
COURT COMMITTED A REVERSIBLE ERROR
OF LAW BY DISREGARDING THE MANDATE
OF McDONNELL DOUGLAS v. GREEN

The Railroad agrees (D. Br. p. 25) that McDonnell Douglas v. Green requires that even if an employer articulates a legitimate, nondiscriminatory reason for a plaintiff's discharge, the court must then consider all relevant evidence submitted by plaintiff to show that the employer's stated reason for plaintiff's discharge was, in fact, a pretext for discrimination. There can be no question that the court made no findings with respect to such evidence of pretext as: defendant's prior treatment of Harris and Harris' prior record of service; defendant's pattern and practice with respect to minority employment; statistical evidence of discrimination; how defendant's concededly subjective criteria for disciplinary action could (and in fact did) serve as the vehicle for

* Of course, the Railroad's argument does not even address the disparate treatment accorded to Satter, Landsperg or the group of employees who refused direct orders to cross a picket line, all of whom are management employees and received more lenient discipline for the same or more serious offenses or, alternately, the same discipline for more egregious offenses. (See Pl. Br. pp. 29-33).

discrimination and retaliation against Harris; defendant's failure to follow its standard operating procedures with regard to Harris; and the shifting and inconsistent reasons given by defendant for Harris' discharges in 1975 and 1976. The Railroad's response seems to be that even if this evidence had been considered, the court would have found no discrimination and held in defendant's favor. Such speculation, however, is no substitute for the trial court's failure to satisfy the mandate of McDonnell Douglas v. Green.*

A. The Railroad's Prior
Treatment of Harris

Defendant's apparent justification for the Court's failure to consider and to pass upon all of the above evidence (in particular, the Railroad's prior treatment of Harris) is twofold: (1) that the court below was already familiar with Harris' allegations and "in the face of the evidence presented by the LIRR" did not see fit to

* The lower court's obligation pursuant to McDonnell Douglas v. Green, to consider and pass upon such relevant evidence of pretextual discrimination is concurrent with and amplified by its statutory obligation pursuant to F.R.C.P. 52(a), which requires that findings of fact on the merits be made by the lower court and that such findings include the subsidiary facts which disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on the issue of discrimination. See Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43 (7th Cir. 1976); Lemelson v. Kellogg Company, 440 F.2d 986, 988 (2d Cir. 1971).

make "extensive findings" on prior acts of discrimination and retaliation (D. Br. p. 27); and (2) that the LIRR did not come under the ownership of M.T.A., an agency of the State of New York until 1966; that it was therefore not "really" subject to Title VII until 1972; and that Harris' allegations of discrimination prior to this time are time-barred (D. Br. pp. 27-28 n. 33).

Defendant's first attempted justification requires little comment. The Supreme Court explicitly stated in McDonnell Douglas v. Green that a trial court's determination at the second stage of analysis (i.e., the employer's articulated reasons for discharge) in no way excuses a court's failure to progress to the third stage of analysis (i.e., the employee's showing that articulated reasons for discharge are in fact pretextual). 411 U.S. 804-805. Defendant's second argument that the court below could ignore evidence of discrimination prior to 1972 as such complaints are allegedly time-barred reveals a total lack of comprehension of McDonnell Douglas v. Green, and of the critical issue of discrimination before this Court. The long history of discrimination and retaliation by the Railroad against Harris is extremely relevant to the question of the intent of the Railroad in 1976 when it discharged Harris. As McDonnell Douglas v. Green makes clear,

an employer's present intent and actions with regard to a plaintiff must be viewed in light of the past treatment of this plaintiff by the employer, the employer's pattern and practice with regard to minorities, etc. Id. at 804-5. It is not relief from the past conduct for which one presently brings suit but rather relief from the present act of discrimination, which discrimination becomes all too clear in light of the employer's past conduct. The question of whether the Railroad's past conduct with regard to Harris gives rise to a present cause of action not time-barred is totally irrelevant to the issues herein. (Pl. Br. pp. 35-38).*

In discussing Harris' history with the Railroad, defendant asserts that when he first applied for the position

* In any event none of Harris' allegations are time-barred under United Air Lines v. Evans, 45 U.S.L.W. 4566 (May 31, 1977). In United Air Lines the Supreme Court rejected plaintiff's claim of a discriminatory discharge because plaintiff failed to file a timely complaint with the EEOC. Discharge is a discrete, non-continuing violation (Terry v. Bridgeport Brass Company, 519 F.2d 806 (7th Cir. 1975)) whose time limit begins to run at the time of discharge. IUE Local 790 v. Robbins & Myers, 97 S. Ct. 441 (1976).

On the other hand, the allegations raised by Harris of prior discrimination and retaliation evidence a history of Title VII violations in promotion which continued up to -- and, indeed, beyond -- the time Harris filed his complaint with EEOC. Such continuing violations can be challenged as long as the discriminatory policy still exists. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975).

of ASM the Railroad had "made some changes in the procedure formerly utilized." As discussed above at p. 1, this assertion, made for the first time on appeal, has absolutely no basis in the record. Moreover, it hardly explains why, for example, Harris was required to meet standards that were not imposed on a white employee, Robert Partridge, who applied for the ASM position at the same time as Harris. (See Pl. Br. pp. 6-7).

The Railroad also alludes to several decisions of the New York State Division of Human Rights involving Harris (D. Br. pp. 3-4) as if such decisions are dispositive of the present action.* In fact, these determinations are in no sense binding on courts which must conduct a full scale inquiry into allegations of discrimination and make de novo findings of fact. See Voutsis v. Union Carbide Corporation, 452 F.2d 889 (2d Cir.), cert. denied, 406 U.S. 918 (1971); Benneci v. Department of Labor, N.Y. State Division of Employment, 388 F. Supp. 1080, 1082 (S.D.N.Y. 1975). Moreover, it is uncontested by defendant that the Equal Employment Opportunity Commission, giving substantial weight

* The Railroad neglects to mention in this connection that it is uncontested that after Mr. Harris complained to the Human Rights Division in 1967, the Railroad promised, at the suggestion of the Commissioner, to set up a posting program for Mr. Harris and in fact did so (75 Tr. 24); or that after his second complaint to the Division, the Railroad was given 30 days to retest Mr. Harris, which it did and which test Mr. Harris passed (75 Tr. 30).

to these proceedings before the Division of Human Rights, determined that there was reasonable cause to believe that the Railroad had, inter alia, violated Title VII by excluding Harris and other blacks from management positions. (Affidavit of Edward E. Harris, dated November 16, 1976 and Exhibit A thereto).

B. The Railroad's General Pattern And
Practice of Discrimination Against
Blacks in Management

The Railroad, for the first time in its appellate brief (D. Br.p. 25), argues that "the testimony of Mr. Zeman (Tr. 736 - Tr. 750) showed that the LIRR's EEOC statistics, relied upon by plaintiff, were understated, particularly in regard to management personnel, by about 20 percent." This statement is simply false.

Zeman's only testimony with regard to "newly discovered" blacks in management (Tr. 748) was that he could recall six black workers who held management positions prior to 1972 but that they were not all employed at the same time or continuously (Tr. 749). Even if the six newly discovered black management employees were assumed to have been employed all at the same time and continually since 1966, the percentage of blacks in management would change only as follows: 1966 (4.40%), 1967 (3.87%), 1968 (3.15%), 1969 (3.21%), 1970 (3.89%), 1971 (3.19%), 1972

(3.37%) and 1973 (3.80%). (See Pl. Br. pp. 39-41; P. 75, Ex. 11). There is thus no basis for the Railroad's claim that the EEOC statistics in regard to management personnel were understated by 20%.

The Railroad erroneously asserts (D. Br. p. 25) that the court below found that the evidence submitted by plaintiff of a statistical pattern and practice of discrimination in the hiring and promotion of blacks was insufficient to prove anything. In fact, however, the lower court's only reference to plaintiffs' overwhelming statistical showing was that "proof of a statistical imbalance in the LIRR's management hiring is alone not enough to show such a pretext" (Op. at 13). Plaintiffs have never claimed that statistics alone establish pretext, but they do contend that statistics, especially those which portray a pattern and practice of discrimination as blatant as those in the instant case (see Pl. Br. pp. 38-41), are highly relevant as a factor, among all the others present herein, to establish pretextual discrimination.

C. The Railroad's Subjective Disciplinary Actions

Defendant, recognizing that a subjective manner of discipline may serve as the vehicle for discrimination (D. Br. p. 26) contends that the existence of a subjective

discipline policy without more does not violate Title VII. That proposition is inapplicable to the instant case, as much more than the mere existence of such a subjective disciplinary system is present herein - e.g., the clear-cut statistical pattern and practice of the Railroad which demonstrates its general attitude towards blacks; the detailed history of discrimination and retaliation by the Railroad against Harris; the Railroad's failure to follow its own standard procedures with regard to Harris; and the shifting reasons given for his discharges in 1975 and 1976. In light of all this, the Railroad's totally subjective system of discipline served as the vehicle - the pretext - for discrimination and retaliation against Edward Harris (Pl. Br. pp. 41-44).

D. The Railroad's Failure to Follow
Normal Operating Procedures Vis-
a-Vis Harris

The Railroad addresses (D. Br. pp. 26-27) only two of the six examples of its failure to follow its own standard operating procedures with regard to Harris detailed by plaintiffs, presumably conceding that it has departed from its standard procedures in dealing with Harris on four different occasions.* Moreover, by arguing that these deviations from

* See Plaintiffs' Opening Brief at pp. 44-47 for a detailed account of defendant's failure to follow its own procedures vis-a-vis Harris on all six occasions. With respect to the Railroad's failure to transfer Harris before removing him,
[Footnote continued]

standard procedure are insufficient to prove disparate treatment, the Railroad confuses proof of pretext by evidence of disparate treatment with proof of pretext by evidence of a failure to follow standard procedures. As indicated in our opening brief (Pl. Br. pp. 44-47), proof of deviations from standard operating procedures with regard to a plaintiff claiming discrimination is, in itself, an independent ground to support the conclusion that plaintiff's dismissal was a pretext for unlawful discrimination. See Jackson v. City of Akron, 411 F. Supp. 680 (N.D. Ohio 1976); Westinghouse Learning Corp., 211 N.L.R.B. 14, 40-43 (1974).

[Footnote continued from preceding page]
 the Railroad does not deny that other white employees who were accused of malfeasance at Penn Station were transferred to Jamaica or Brooklyn rather than being demoted and that Harris was not given this opportunity. Instead, the Railroad argues that this was Harris' third alleged offense of insubordination, and that he had received "lenient discipline" previously. The first alleged offense of insubordination took place in 1971 and involved Mr. Stewart. The Railroad's reliance on this "incident" manifests its grasping at straws to support its untenable position. Its statement is belied by its actions: Mr. Harris was appointed to the permanent position of ASM in 1972, a year after this "incident", and from that time until his demotion was one of the highest paid ASMs employed by defendant, the rate of pay being based on merit (75 Tr. 282). As for the second alleged act of insubordination - the 1975 incident involving a single train announcement - we have shown that this was in itself an act of retaliation (Pl. Br. pp. 14-18). And even if it was not retaliation, query why the Railroad sought to immediately strip Harris of his job in 1975 without transferring him as had been done with white employees. Thus defendant counsel's bold assertion that the Railroad had previously been "lenient" with Harris is contradicted by its hurried efforts to remove Harris in 1975 (as well as 1974 and 1976) without any effort to accord him the same opportunities given to white management employees.

E. Shifting and Contradictory
Reasons Given by Defendant
For Harris' Discharge

Defendant did not address itself at all to plaintiffs' argument that the lower court failed to consider, on the issue of pretext, evidence of the shifting reasons given by the Railroad for Harris' discharges in 1975 and 1976.

Instead, defendant attempts to rationalize some of the shifting and contradictory reasons given for Harris' demotion in 1975 by stating that, although Rizzacasa, immediately after removing Harris from service in 1975, called Mr. King at Jamaica Station and told him that Harris had been removed for "failing to do his duties" in not having the announcement made (75 Tr. 368-69), and not, as alleged later at trial, for insubordination, "it is not surprising that Mr. Rizzacasa, did not go into details or give all his reasons for removing Mr. Harris from service to Mr. King" because King was not Rizzacasa's supervisor. (D. Br. p. 8)

Defendant's attempted rationalization is unconvincing for several reasons: first, the reason given by Rizzacasa to King for Harris' dismissal was not less "detailed" nor one of several reasons later advanced for the demotion of Harris, as defendant states. Second, demotion for failure to do one's duties (the reason for which Rizzacasa told King that he removed Harris) is different* than the subsequent

* As the defendant in its Brief (D. Br. pp. 7-8) goes to great lengths to point out.

charge of "insubordination" (the ground which Rizzacasa later explained to Gaynor and Dixon was the reason for Harris' dismissal (75 Tr. 407-408, 410, P. 75 Ex. 12)) and thus represents an obvious shift in the Railroad's attempt to justify its baseless termination decision. Finally, defendant conveniently ignores the event which intervened between Rizzacasa's statement to King (i.e., Harris was discharged for failing to do his duties) and his subsequent statements to Dixon and Gaynor (i.e., Harris was removed for "insubordination") - that is, the usher's frank admission to Rizzacasa that he, not Harris, had made the mistake and thus failed to do his duties (75 Tr. 106-107).

The record is also clear as to the Railroad's shifting and contradictory reasons for discharging Harris in 1976 as discussed above at pp. 3-5, notwithstanding defendant's vague and conclusory protestations to the contrary (D. Br. p. 20).

CONCLUSION

Title VII, which was designed to eliminate discrimination in employment practices, can only be an effective deterrent to unlawful activities if those employees who attempt to invoke its protection by seeking redress in the courts are shielded from retaliatory treatment by recalcitrant employers. The trial court's opinion, fraught

with errors of law and unbuttressed by the findings of fact mandated by the Federal Rules of Civil Procedure, should not be permitted to stand. Accordingly, we respectfully submit that the order below should be reversed with directions that a preliminary injunction against the Railroad be entered for the plaintiffs.

Dated: New York, New York
August 5, 1977

Respectfully submitted,

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ADDENDUM A

The court below declined to resolve the factual dispute as to who was specifically at fault for the four train delays on the night of November 9-10 (Op. at 6) and the Railroad did not advance Harris' alleged responsibility for such delays as a ground for his removal. (supra at 3-5) However, the Railroad so mischaracterizes the record that a short response is in order. A few examples of the inconsistencies and half-truths in the Railroad's presentation of the evidence will suffice to indicate the fallaciousness (as well as the already demonstrated irrelevancy) of the Railroad's argument.

The Railroad states that Train 1691 was delayed in arrival because Harris failed to issue appropriate instructions to bring the train into the station (D. Br. p. 21). Harris testified that neither the "C" Tower operator nor the yardmaster consulted him regarding the holding of Train 1691 out of the station (Tr. 55) and that, in his opinion, Train 1691 could have been brought in immediately (Tr. 55). The yardmaster admitted that Train 1691 could have been brought into the station immediately (Tr. 181); that it was his decision to hold Train 1691 out of the station (Tr. 182); that this decision was made without consulting Harris (Tr. 183); and that the resulting delay was not Harris' responsibility (Tr. 183). C Tower testified that he also decided, independent of the yardmaster, to hold Train 1691 out of the station (Tr. 364) and that he did not inform Harris or the yardmaster of that decision (Tr. 371).

The Railroad asserts that Train 1602 (which entered the station as Train 1691) was delayed in departure because Train 1691 was not repositioned correctly or "pulled west" on its arrival (D. Br. pp. 20-21).^{*} The testimony of the Railroad's own witnesses again belies their position. The yardmaster admits that Harris told him to move Train 1691 west by 1:00 a.m. (Tr. 185-186), 11 minutes prior to its scheduled departure at 1:11 a.m. and that it normally takes three to five minutes to pull the train to its proper position (Tr. 186-187). The yardmaster further testified that the train was delayed for five minutes because the train crew refused to close its doors and carry out his orders in timely fashion (Tr. 187). The yardmaster specifically stated that he never advised Harris of these problems and that the delay "wasn't Harris' fault." (Tr. 188).

With respect to the delay in the departure of Train 82,^{**} consider the following inconsistencies in the testimony

^{*} Harris testified that he communicated with Train 1691 and informed the engineer that when he finally entered the station he would have to pull west (Tr. 53-55). The Railroad misleads the Court when it states that Quinn, the engineer of Train 1691, denied having any conversation with Harris. Quinn's testimony is that there had been "partial", "garbled" communication with Harris who was clearly trying to reach him (Tr. 385-389).

^{**} On November 9-10 line 3, the East River tunnel normally used by the Railroad, was taken out of service before Train 82 departed, necessitating a repositioning of Train 82 so that it could depart through line 1, an alternate tunnel. At departure time Train 82 was not in the proper position to travel line 1. The factual dispute is whether or not Harris was timely informed that line 3 was being taken out of service. The trial court declined to rule on this dispute. Op. at 6.

of the Railroad's own personnel: (1) Gaynor claims it was not A Tower's job to advise Harris of the time of a line closing (Tr. 485-486), yet his superior, Dixon, emphatically testified that this was part of A Tower's job (Tr. 685-686). It is undisputed that A Tower never even attempted to contact Harris and that both calls by Harris to A Tower went unanswered. (2) Train 82 sat in its improper position, i.e., was fouling, for 16 minutes. Gaynor claims it was not the yardmaster's responsibility to check to see if Train 82 was fouling (Tr. 543). Yet the yardmaster himself admits that this was part of his job but that he did not do it (Tr. 169). (3) C Tower admits that he has a machine in his tower which indicates whether a train is fouling (Tr. 359-361; 381-382), but claims that the yardmaster never asked him to check for fouling (Tr. 380) and that had the yardmaster made such a request he would have done so (Tr. 381). But both the yardmaster and Harris testified that they had requested C Tower to check for fouling yet he never did (Tr. 37, 186). (4) C Tower says that he would have checked for fouling but that he heard the yardmaster tell Harris to position the train correctly and assumed it had been done (Tr. 378; 382-384). But the yardmaster -- who was supposed to have made this communication -- admitted that the communication never took place (Tr. 192, 302).*

* Additional examples of the Railroad's flagrant distortion of the Record abound. This Court is respectfully referred to the briefs filed in the trial court for a more detailed analysis (Plaintiffs' Post Hearing Memorandum, submitted January 15, 1977, pp. 28-41; Plaintiffs' Reply Memorandum, submitted January 26, 1977, pp. 3-7).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAILROAD, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

RELEVANT STATUTES SUBMITTED
BY APPELLANTS

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The relevant portions of Title VII are excerpted herein.

42 U.S.C. §2000e-2:

"§2000e-2. Unlawful employment practices--
Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-3:

"§2000e-3. Other unlawful employment practices--Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No.

FRANCES JOY CAPERS, et al.,

against

Plaintiffs—
Appellants,

AFFIDAVIT OF SERVICE
BY MAIL

LONG ISLAND RAILROAD, et al.,

Defendant—
Appellees.

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 3133 Sedgwick Ave.,
Bronx, N. Y.

That on August 5,

19 77 deponent served the annexed REPLY BRIEF

on RICHARD H. STOKES, ESQ.

attorney(s) for Appellees

in this action at Long Island Railroad, Jamaica Station, Jamaica, New York 11435
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me August 5, 1977.

MICHAEL J. PRIOR
Notary Public, State of New York
No. 41-4608458
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1979

Michael J. Prior *Joseph P. Gunset*
The name signed must be printed beneath
JOSEPH P. GUNSET

Index No.

against

Plaintiff

Defendant

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19

deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law